SUPREME COURT, U. S.

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JOHN F. DAVIS, C

(Submitted upon consent of the parties.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 47

SAM GINSBERG,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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Interest of the Authors League

The Authors League of America, Inc. is a national society of professional writers and dramatists. One of its principal purposes is to express the views of its members in controversies involving the rights of free speech and free press. Because the determination of the issues presented in this case may significantly affect those fundamental rights, the Authors League respectfully submits this brief, as *amicus curiae,* in support of appellant.

POINT I

The statute invades the First Amendment rights of authors, publishers, the public—and booksellers—by compelling the bookseller to determine, under threat of criminal sanction, if a book is obscene for minors.

Whatever definition of obscenity for children is permissible under the First Amendment, the method of enforcement embodied in the New York statute imposes an unconstitutional restraint of the freedom of speech of authors, publishers, and the public—as well as booksellers. The Law compels a bookseller, on penalty of fine or imprisonment, to decide whether each book or periodical he sells (1) depicts "nudity . . . sexual conduct . . . sexual excitement . . . or sado-macochistic abuse . . ." and, if so, (2) whether such material is "harmful to minors" under a trilogy of abstruse criteria. (Sec. 484 (h); now Secs. 235.20-235.22, New York Penal Law). As indicated in Point II, we believe the statute applies to constitutionally protected material.

But even if the statute be construed as pursuing only the purpose this Court has indicated is "legitimate"—preventing the dissemination of obscene material to children—it does so "by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." (*Shelton* v. *Tucker*, 364 U.S. 479, 488). The statute's method of enforcement still threatens "a total suppression of material" not obscene for adults (*Jacobellis* v. *Ohio*, 378 U.S. 184, 195); it will restrict the adult "public's access to forms of the printed word which the state could not constitutionally suppress directly" (*Smith* v. *California*, 361 U.S. 147, 154); and it will restrict the sale to children of material protected by the First Amendment. It will thus invade the

First Amendment rights of authors, publishers and the public (adult and minor), as well as the rights of book sellers—rights which are guaranteed "for the benefit of all of us." *Time Inc.* v. *Hill,* 385 U.S. 374, 389.

We submit that if the First Amendment rights of all concerned are to be adequately protected a bookseller should not be subjected to punishment for selling a book to a child unless its "obscenity" has previously been established by the State in a judicial proceeding against the publisher. As indicated below, New York, and other States, have statutes which provide—or could be easily amended to provide—for such procedures.

The First Amendment rights of all concerned are seriously endangered when the charge of obscenity against a book is tried in a criminal (or civil) action against an individual bookseller. The book's right to be sold may lose, by default. Moreover, the penalties and risks which the statute imposes on the bookseller lay the foundation for the most insidious forms of grass-roots censorship and self-censorship. *Smith* v. *California,* 361 U.S. 147.

(i) Scienter and Censorship

In *Smith* v. *California,* the Court considered one effect of a "bookseller" statute. If a bookseller can be convicted without proof he knew the contents of a work, he will "restrict the books he sells to those he has inspected" and "if the contents of bookshops and periodical stands were [thus] restricted . . . they might be depleted indeed." (at p. 153). His fears will lead him to drastic "self-censorship" of the works he sells and "thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." (at p. 153)

But the restrictive effects cannot be avoided merely by requiring the State to prove *scienter*. Under Sec. 484(h) a bookseller faced the threat of being charged with (i) "general knowledge . . . or reason to know . . . the character or contents . . ." or (ii) "grounds for belief" which oblige him to inspect the work. Under the amended Sec. 235.22, the bookseller is "presumed [to have] knowledge of the character and content" of the book. Under either version there would still be the pressure on him to inspect; and therefore the same process of self-censorship condemned in *Smith*. (Indeed, the new section is fatally defective because it does not require the State to prove *scienter;* it creates a presumption the bookseller must rebut.)

But even if the new statute clearly required the State to prove *scienter,* it would still be [as is Sec. 484(h)] a deadly threat to First Amendment rights. The risk that a Court would find *scienter* was proven will always exist—the methods by which the Act is employed and enforced make it likely. More important, for the reasons discussed below, the mere fact that a prosecution can be commenced—at which stage *scienter* need only be charged—makes the statute a potent weapon of repression.

(ii) The Bookseller Cannot Defend a Book's Right To Be Sold

Obviously, booksellers do not have the time to inspect the works they sell for "obscenity" (or, "harmfulness") for minors. More important, they are not capable of making the very difficult determination of whether a book is "obscene" for minors; nor can they afford to "back up" such a determination (if they make one) by defending the book in a criminal or civil suit.

From the judicial history of the *Roth* standard, it is obvious that even a bookseller with a law degree would have great difficulty deciding whether many works were obscene—for adults or children. For example, a majority (4) of the New York Court of Appeals concluded that TROPIC OF CANCER was so clearly obscene (for adults) that "if, as the County Court held [TROPIC OF CANCER] is not obscene as a matter of law, it is difficult to conceive when, if ever, a book can be held obscene under any established legal standard" (*People* v. *Fritch*, 13 N.Y. 2d 119, 124). But the minority (3) said the majority opinion was "no more than an expression of individual view having no support aside from its own pronouncement" and that the prosecution of TROPIC "call[s] to mind the book burning of eighteenth-century Europe and New England" (pp. 129, 132). Equally sharp differences of opinion, and equally conflicting expressions of certainty as to the obscenity and non-obscenity of the same work, have characterized opinions of the highest state courts and, indeed, of this Court (cf. *Ginzburg* v. *U. S.*, 383 U.S. 463; *Mishkin* v. *New York*, 383 U.S. 502; *Memoirs* v. *Massachusetts*, 383 U. S. 413).

If the determination of obscenity is so frequently difficult for appellate judges, can we really expect a bookstore manager, or stationery store proprietor, to decide if the next ULYSSES or LADY CHATTERLY'S LOVER is obscene [under Sec. 484 (h)] for a 16-year old high school student. Or can we expect that, having decided the book is not obscene, he would sell it—if he risks a jail term should it later develop that his judgment, unfortunately, conformed to the minority, rather than the majority, opinion of the New York Court of Appeals or this Court. And is it realistic to expect that a bookseller will repeat this process of difficult judg-

ment and risk-taking, book after book, periodical after periodical.

Common sense tells us that he cannot, and will not, make these decisions or act on them when they may cost him money or even his freedom. Most certainly, he will not do so, in the case of books or periodicals which are under attack from public officials or private groups. Thus, in the very situations where the constitutional guarantees of free speech and press should serve their purpose, the statute brings the greatest pressure to bear on the weakest link in the chain of communication to cut off those freedoms—to suppress circulation.

Inevitably booksellers will receive advice or warnings from police officials, district attorneys, or citizens' groups, that various books and magazines violate the New York Statute if sold to children. The bookseller will thus face the risk that having been put on warning, *scienter* may be held proved. He faces the risk that the book may be held obscene, even though he thinks it is not. He faces the risk if he sells it to a child under 17, through mistake or misstatement of age (by the child), that he may go to jail. Most important, he faces the risk of a proceeding. If the warning comes with sufficient emphasis, or from official sources, or from more than one source, the bookseller is likely to take the easiest course—to simply return the works or refuse to accept them.

The Statute is a natural breeding ground for these restrictive pressures; and for the resulting grass-root censorship and self-censorship they create. In *Bunis* v. *Conway*, 17 A.D. 2d 207, 210, the Court said:

> "Booksellers are naturally reluctant to incur the risk of criminal prosecution since that entails ad-

> verse publicity and physical and mental strain as well as expense, even though the prosecution should ultimately terminate in the dismissal of the charge. They may therefore refrain from selling the book denounced by the authorities and, in that event, no occasion for criminal prosecution ever arises. The mere threat of prosecution may thus have the effect of deterring or suppressing the sale of the book without any judicial determination ever being made as to whether the book is actually obscene. Such a system of informal censorship has been repeatedly condemned as a prior restraint by the action of governmental officials, in violation of the First and Fourteenth Amendments."

See also *Zeitlin* v. *Arnebergh,* 59 C. 2d 901.

Undoubtedly, it is the threats and risks which bookseller statutes create that give teeth to the often successful efforts by official and private groups to compel booksellers to stop selling books which are protected by the First Amendment against restrictions, for children or adults. (cf. *Bantam Books* v. *Sullivan,* 372 U.S. 58, 67; *Bunis* v. *Conway,* 17 A.D. 2d 207, 210).

The possibilities for suppression of works protected by the First Amendment are so great under the Statute because the bookseller does not have the resources or motivation to defend one book, or several books, against charges of "obscenity", or "harmfulness", to minors. As this Court pointed out in *Bantam Books, Inc.* v. *Sullivan* (372 U.S. 58, 65) one "who is prevented from selling a few titles is not likely to sustain sufficient economic injury to induce him to seek judicial vindication of his rights . . ." He cannot afford to bring a declaratory judgment action to clear every book that is placed under a cloud by threats of police

or prosecutors; nor even to pay an attorney's fee for a legal opinion that the book is not "harmful to minors." He is even less likely to risk paying a fine or undergoing the costs of defending a criminal prosecution. Inherent in a system of regulation thus aimed primarily at the bookseller is the restraint imposed by "fear of the expense involved" in defending against prosecutions. For the bookseller who has so little at stake, this threat of expense "must inevitably cause (him) to 'steer . . . wider of the unlawful zone.' *New York Times Co.* v. *Sullivan*, 376 U.S. at 279." *Time, Inc.* v. *Hill*, 385 U.S. 374, 389.

Moreover, by thus diverting the fundamental issue of "obscenity"—of a book's right to be sold—to a proceeding aimed at the bookseller, the New York Statute effectively deprives its publisher of his freedom of speech. As this Court pointed out in *Bantam Books* v. *Sullivan*, 372 U.S. 58, 64-65, freedom of press protects circulation, as well as publication, of a book; and the direct result of a restriction aimed at preventing booksellers from selling it, is to curtail the publisher's right of freedom of press.

Even if the publisher could intervene in prosecutions against stores which sold his book, the Statute produces unconstitutional restraints on his freedom of speech. Suppression can occur without ever commencing a prosecution; or the bookseller may capitulate, drop the book and accept a dismissal. Moreover, as the Supreme Court of California pointed out, even the acquittal of a bookseller in one prosecution would not prevent prosecutions against other sellers of the book—in other counties of the state, or even in the same country. "Such an approach" it said "must inevitably engender a hodgepodge pattern of suppression and sale." *Zeitlin* v. *Arnebergh*, 59 C. 2d 901, 907.

(iii) Obscenity for Minors Should Not Be Regulated by Methods Which Unduly Restrain Constitutionally Protected Materials

In regulating the dissemination of obscene materials to children, the State should be "highly selective" in its choice of remedies, adopting a method designed to achieve that "narrow" purpose rather than one that also "broadly stifle(s)" material which is constitutionally protected for distribution to children or adults. *Shelton* v. *Tucker,* 364 U.S. 479, 488.

New York has not been "selective". On the contrary it has adopted a statute which generates a maximum, rather than a minimum, of improper restraint on constitutionally protected books and periodicals. It does so by permitting the prosecution of a bookseller for selling to a minor a book which has not been judicially determined to be obscene; and posing the threat that the book may later be ruled obscene, in a prosecution based on the sale. The bookseller will be driven to suppress books that he is actually entitled to sell because he is incapable of making the difficult determination of obscenity himself and cannot afford to seek a judicial determination, book-by-book, in declaratory judgment actions or in defending criminal prosecutions under the statute.

A statute with this potential for suppression can hardly qualify as the "sensitive tool" which this Court said must be used in the "separation of legitimate from illegitimate speech"; it is scarcely a "most rigorous procedural safeguard(s)" or "adequate bulwark" for freedom of speech. *Bantam Books* v. *Sullivan,* 372 U.S. 58, 66.

The statute's potential for suppression—through self-censorship and grass-roots censorship of booksellers (cen-

sorship by threat)—would be eliminated by adding a requirement that a bookseller could only be prosecuted for selling a book if it had previously been judged obscene for children, in a single civil or criminal proceeding brought against its publisher—provided that the publisher had made himself amenable to such proceedings in New York.

This requirement would not hamper proper enforcement of the statute against booksellers or others who sold a book which was indeed obscene for children. A prompt, judicial determination that it was obscene could be obtained in a proceeding against the publisher or his designated distributor—under a statute such as Sec. 22-a of New York's Code of Criminal Procedure, which provides for injunction proceedings against publishers and distributors of obscene material. (By a simple amendment, Sec. 22-a could also deal with material obscene for children.)

Moreover, such a proceeding is much more likely to be a truly adversary one, in which the book's right to be sold would be vigorously defended. It is much less likely that the right would be lost by default, or through inadequate defense—a grave threat when the issue is determined in a prosecution of the bookseller under the present statute.

The requirement that obscenity first be determined in a proceeding against the publisher also serves the State's interests. First, it helps insure that the statute will not suppress the sale to children or adults of material protected by the First Amendment—a result which the State of New York is obviously interested in obtaining. Second, the requirement will avoid the multiplicity of local prosecutions against the same book which the present law permits—it will obviate a "hodge-podge pattern of suppression and

sale." *Zeitlin* v. *Arnebergh,* 59 C. 2d 901, 907. Third, it will simplify local enforcement and eliminate the potential for grass-roots censorship. Police officials and district attorneys would not longer have to make ill-founded threats or charges that particular books or periodicals violated the law; they would be able to make simple, factual statements that specific works had been judged obscene in judicial proceedings. The bookseller could easily verify this information.

Obviously, the requirement could only apply to a book whose publisher was amenable to process—either as a domestic corporation or resident; or, in the case of foreign publishers, by some voluntary act. Foreign publishers should not be compelled to submit to New York jurisdiction for civil or criminal purposes. However, if they or their designated distributors do not, then booksellers would not have the protection of the requirement for such a prior determination of obscenity in selling their books.

It may be contended that the State would have insufficient time to cope with periodicals that are only on sale for a limited period. However, there are alternative methods for assuring that the question of obscenity be first determined in a proceeding against the publisher of such works. For example, the requirement of a prior determination of obscenity, in the case of magazines sold for brief periods of time, could be limited to those magazines whose publishers or distributors *elected* to submit them to the Attorney General, within a specified number of days before they are placed on sale in the State. This would give the State an opportunity to determine the question of obscenity in a proceeding against the publisher, and would thus protect retailers. We

hasten to add that obviously such submission could not be required. The question of obscenity could also be brought to test in a proceeding against the publisher by a statutory requirement that it identify for booksellers those of its works which were not to be sold to children under the statute.

POINT II

The statute restricts the sale of material which is fully protected by the First Amendment.

In *Jacobellis* v. *Ohio,* 378 U.S. 184 (1963), Mr. Justice Brennan suggested that the states consider whether the preferable method of "preventing the dissemination of *material deemed harmful* to children" might be to adopt "laws aimed specifically at preventing the distribution of *objectionable material* to children, rather than at totally prohibiting its dissemination" (p. 195). (Emphasis supplied.)

We agree with the United States Court of Appeals in *Interstate Circuit, Inc.* v. *City of Dallas,* 366 F. 2d 590, that "harmful" or "objectionable" material is synonymous with "obscene material," and that a State may not restrict dissemination to children of material on grounds other than obscenity.

(i) The Statute Restricts Material Which is not Obscene

The New York Statute, by its terms, seems designed to reach material that is not obscene for minors, whether obscenity be judged by a constant standard—or a variable standard, such as that applied in *Interstate Circuit,* where the Court concluded that obscenity for children should be

judged by "the prurient interest of its intended and probable recipient group" (366 F. 2d 590, 596). For example, paragraph (1)(b) prohibits "nudity" as a category separate and apart from "sexual conduct"; and paragraph (1)(e) also deals with types of conduct unrelated to sex. In *Roth* v. *United States*, 354 U.S. 476, the Court said that "obscene material is material which deals with sex in a manner appealing to prurient interest" (p. 487). The Court did not adopt in its entirety the American Law Institute's definition, in which nudity as well as sex are included in the category of the obscene. Moreover, the statute only makes it a crime to sell or loan proscribed material "for *monetary consideration* to a minor" (emphasis supplied). By contrast, the New York prohibition against obscene material (Sec. 235.05, Penal Law) prohibits the promotion or possession of any obscene material. It seems doubtful that if Section 484(h) (now Secs. 235.20-22) was intended to apply only to obscene material, it would exculpate any transfer of material simply because money did not change hands.

(ii) A Standard of Variable Prurient Interest Will not Protect First Amendment Rights

But assuming that the New York statute is intended—or construed—to prohibit only the sale of material which is obscene, we respectfully submit that it does not limit itself to a constitutionally valid test, because it embodies a variable standard of prurient interest, similar to that employed by the Court of Appeals in *Interstate Circuit Inc.* v. *City of Dallas, supra.*

We respectfully submit the use of a variable standard—based on the assumption that "children" as a group have a

single, ascertainable "prurient interest" — will inevitably and unconstitutionally restrain circulation of books and periodicals which are protected by the First Amendment, whether distributed to children or adults.

The statute applies to children of all ages—up to 17. Obviously, the prurient interest of a child of 9 is different from that of a 12-year old; and the prurient interest of a 13-year old is radically different from that of a college or high school student a few days short of his 17th birthday. It would not even be theoretically possible for jury or judge to determine whether a given book was obscene for "minors" unless it be assumed that all are to be governed by the lowest common denominator of prurient interest, or that "obscenity" is a complete "variable"—shifting from one age level to the next, as the child progress from kindergarten to college.

To add a "variable" prurient interest to the test of obscenity would be to add another ambiguous factor which will make the *Roth-to-Memoirs* standard even more difficult to use. Clearly the standard is not now an easy one to apply. *Jacobellis* v. *Ohio,* 378 U.S. 184, 187, 191. It has frequently proven difficult for even appellate judges; the sharp difference of opinion in the New York Court of Appeals as to whether TROPIC OF CANCER was obscene under the *Roth* test, is a not unusual sample of the problem appellate judges face with the standard. With "prurient interest" made a variable, the *Roth* standard could not possibly give publishers or booksellers that degree of "fair notice of what acts will be punished" which is so essential to the protection of free speech. *Winters* v. *New York,* 333 U.S. 507, 509.

(iii) The Definition of Obscenity for Minors Should be Based on Mr. Justice Stewart's Description of Hard-Core Pornography

If the Court is to depart from the *Roth* standard in defining material which is obscene for children, then we respectfully submit that it should consider whether the result might be better achieved by adopting a definition based on the description of "hardcore pornography" made by Mr. Justice Stewart in *Ginzburg* v. *United States,* 383 U.S. 463, 499. In enumerating the kinds of materials he meant by the term, Mr. Justice Stewart included:

> "photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character . . . drawings in comic book format grossly depicting similar activities . . . pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value."

(cf. *People* v. *Richmond County News,* 9 N.Y. 2d 578, 587)

A definition of obscenity for children based on Mr. Justice Stewart's description of "hardcore pornography" would be less difficult for judges, prosecutors, publishers and booksellers to apply. It would reduce the temptation to substitute personal concepts of "obscenity" for the complex *Roth* standard or one made even more complex by the factor of variable "prurient interest." This would greatly minimize the danger that such regulations produce a "total suppression of such material" or "reduce the adult population . . .

to reading only what is fit for children'' (*Jacobellis* v. *Ohio*, 378 U.S. 184, 195).

We do not contend that the description need be the same as that which would apply to material disseminated to adults. But we doubt that a definition of ''obscenity'' for children need move beyond the boundaries of Justice Stewart's definition. Wherever the line be drawn, we respectfully submit that it cannot be carried much beyond the limitations of his classification without affecting books which are by no means obscene for children and which present problems of taste and parental responsibility, rather than ''obscenity'' or a proven causal relationship to anti-social conduct.

Some parents may decide that a given book or periodical, though not obscene, is not suitable for their children. But the decision is one that they should make and enforce on an individual basis. Other parents may reach the opposite conclusion. Others may abdicate their responsibility. But this does not warrant the great risks to freedoom of speech which inevitably follow from extending restrictions into the area of the non-obscene. This is particularly so, since any such restriction of publication will leave untouched many other, and more potent, influences on the development of a child's character and personality: including the other media which expose him to the world and sex (television, the daily newspapers, national magazines and records), his day-to-day experiences beyond the walls of his home, and the fundamental influences which shape him before he is old enough to buy books, or even to read.

POINT III

The statute does not provide the procedural safeguards required by the First and Fourteenth Amendments.

The statute does not contain procedural safeguards required by the First Amendment. By imposing liability for sale of "obscene" books to children under 17, the statute imposes a formidable deterrent upon the bookseller; one that cannot be excused by analogy to statutes which restrict conduct unaffected by the First Amendment, such as the sale of liquor to minors (cf. *Smith* v. *California,* 361 U.S. 147, 152-153). To avoid liability for inadvertently selling a proscribed book to a 15 or 16-year-old, who has falsely stated he is 17, the bookseller would have to make considerable efforts to obtain satisfactory evidence of the age of each adolescent to whom he sold a copy of a publication proscribed by the statute—and to preserve that evidence in case he is prosecuted. (Indeed, Sec. 235.22 now specifies the types of official documentation a bookseller would have to obtain, to excuse a sale to a child under 17.)

In the face of the very considerable burden and risk thus involved in selling books prohibited by the statute, the safer alternative for a bookseller would be not to stock any book which might be judicially determined to be obscene for children or claimed to be obscene by public officials. The liquor store whose entire stock is banned to children has no choice; but the bookseller has a choice between "safe" and "unsafe" books. It is, indeed, the choice which makes the risk of inadvertently selling such books to children under 17 too great to take—and which makes the penalty such a serious restraint on books intended for adult readers.

The Dallas ordinance, which is before the Court in *United Artists Corporation* v. *City of Dallas* (No. 64), at least partially recognizes this problem; and seeks to dissuade lying by punishing the child who misstates his age. New York does not even provide this safeguard. But even such a provision does not afford a sufficient margin of error for the protection of the bookseller's and publisher's right of free speech. If a child of 10 states he is 17, a bookseller could not believe him. But a 15-year old child may well look 17. A bookseller should be entitled to rely on a child's statement of his age so long as it is not beyond some prescribed and reasonable boundary of belief—for example, so long as a child's actual age is within three years of the statutory minimum. The ordinance should explicitly provide this safeguard. It should not require the bookseller obtain documentary evidence. This would impose a considerable burden on many stores that have a constant flow of business and carry a large selection of periodicals and paperback books; and an even greater burden on those retail establishments which also sell many other types of merchandise. The burden of documenting (and recording the evidence of) the age claim of every youth who may look 17 and who buys a periodical or paperback book which may be proscribed under the statute is an "inhibition" of free speech prohibited by the First Amendment. *Lamont* v. *Postmaster General*, 381 U.S. 301.

CONCLUSION

It is respectfully submitted that the judgment appealed from should be reversed.

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